Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

GILBERTO MARTINEZ-VAZQUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court avoided constitutional concerns by interpreting 8 U.S.C. 1231(a)(6) to limit to a "reasonable time" the period that permanent resident aliens may be detained following final orders directing their removal from the United States. Applying that standard, the Court held that a resident alien generally may not be detained under Section 1231(a)(6) for more than six months after being ordered removed, if the alien demonstrates that there is not a significant likelihood of removal in the reasonably foreseeable future. The question presented in this case is:

Whether Section 1231(a)(6) and *Zadvydas* compel the release of an arriving alien who was apprehended at the border of the United States, denied admission, and ordered removed from the United States.

PARTIES TO THE PROCEEDINGS

Petitioner Phil Crawford, Interim Field Office Director, Seattle, Washington, United States Immigration and Customs Enforcement (ICE), is the successor to Robert S. Coleman, Jr., who was a respondent below. Petitioner ICE is the successor to the relevant responsibilities of the former Immigration and Naturalization Service, which was a respondent below. John Ashcroft, Attorney General of the United States, also is a petitioner and was a respondent below.

Respondent is Gilberto Martinez-Vazquez.

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In the Supreme Court of the United States

No.

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

GILBERTO MARTINEZ-VAZQUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Interim Field Office Director, Seattle, Washington, of United States Immigration and Customs Enforcement (ICE), Department of Homeland Security; ICE; and the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. This case involves the same question as the pending petition for a writ of certiorari in *Benitez* v. *Wallis*, No. 03-7434 (filed Oct. 14, 2003), and the instant petition should be held for *Benitez*.[1]

[1] On March 1, 2003, functions of several border and security agencies, including certain functions of the former Immigration

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 346 F.3d 903. The orders of the district court (App., *infra*, 11a-12a, 13a-15a, 16a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent is one of approximately 125,000 Cuban nationals, many of them convicted of crimes in Cuba, who attempted to enter the United States illegally during the 1980 Mariel boatlift. After Cuba refused to accept the return of Mariel Cubans who were stopped at the border and denied entry into the United States, the Attorney General, through the Immigration

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and Naturalization Service (INS), were transferred to the Department of Homeland Security and assigned within that Department to ICE. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)). Petitioner Crawford is the successor to the INS District Director who was named as a respondent to the habeas corpus petition in the district court. The Attorney General also was named as a habeas corpus respondent in the district court. The position of the government, however, is that the Attorney General (like ICE as an entity) is not a proper habeas corpus respondent in this action concerning an alien's detention. See *Roman* v. *Ashcroft*, 340 F.3d 314, 318-327 (6th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994); but see *Armentero* v. *INS*, 340 F.3d 1058, 1071 (9th Cir. 2003) (determining that Attorney General and Secretary of Homeland Security are proper habeas respondents in "circumstances specific to the situation of immigration detainees"), petition for rehearing en banc pending, No. 02-55368 (9th Cir.).

and Naturalization Service (INS), soon paroled all but a few hundred of those Cubans into this country pursuant to his discretionary authority under 8 U.S.C. 1182(d)(5) (1976 & Supp. IV 1980). See generally *Fernandez-Roque* v. *Smith*, 734 F.2d 576, 578-579 (11th Cir. 1984); *Palma* v. *Verdeyen*, 676 F.2d 100, 101-102 (4th Cir. 1982).

Section 1182(d)(5)(A) then authorized, and as amended continues to authorize, the Attorney General (now the Secretary of Homeland Security, see note 1, *supra*) to parole aliens applying for admission to the United States into the country "temporarily under such conditions as he may prescribe" and only for "urgent humanitarian reasons or significant public benefit," but it provides that "such parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General, the purposes of the alien's parole have been served, the alien shall forthwith be returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

In 1984, the United States and Cuba reached an accord concerning immigration between the two countries, including the return to Cuba of 2746 specified individuals with serious criminal backgrounds or mental infirmities. See Immigration Joint Communique Between the United States of America and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057, 1984 WL 161941. Approximately 1652 Mariel Cubans have been repatriated to Cuba under the 1984 accord. The most recent repatriations occurred in October and December 2003. See generally *Gisbert* v. *United States Attorney General*,

988 F.2d 1437, 1439 n.4 (discussing repatriations), opinion amended, 997 F.2d 1122 (5th Cir. 1993).

Pursuant to Section 1182(d)(5)(A), the Attorney General promulgated regulations in 1987 governing the parole and revocation of parole of Mariel Cubans (defined to include any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980) pending either an exclusion hearing or the alien's return to Cuba or another country. See 8 C.F.R. 212.12; 52 Fed. Reg. 48,802 (1987). Those regulations supplement the general regulations governing the parole and release of aliens who are seeking admission to the United States. See 8 C.F.R. 212.5, 241.4.

In 1990, Congress added a new statutory provision, 8 U.S.C. 1226(e) (1994), which limited the Attorney General's power to release certain excludable, criminal aliens on parole. See Immigration Act of 1990, Pub. L. No. 101-649, § 504(b), 104 Stat. 5050. Section 1226(e)(1) provided that, "[p]ending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony." 8 U.S.C. 1226(e)(1) (1994). Section 1226(e)(2) and (3) then provided that the Attorney General "shall not release such felon from custody" unless the Attorney General determined under 8 U.S.C. 1253(g) (1994) that the alien's country of removability would not accept his return and, *inter alia*, the Attorney General concluded, after review of the alien's request for release and the severity of the alien's felony, that "the alien will not pose a danger to the safety of other persons or to property." 8 U.S.C. 1226(e)(2) and (3) (1994). Section 1226(e) otherwise left unaffected the Attorney General's discretion to grant, deny, or revoke parole under Section 1182(d)(5)(A).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 241, 110 Stat. 3009-546, Congress added a new Section 1231 to Title 8 of the United States Code. Section 1231(a)(2) requires the detention, during the statutory 90-day removal period, of aliens who have been ordered removed from the United States, including aliens who have been stopped at the border and were regarded as "excludable" under prior law.[2] Section 1231(a)(6) then provides that an alien ordered removed who is inadmissible under 8 U.S.C. 1182 or deportable for the commission of a specified crime, or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, "may be detained beyond the [90-day] removal period."

2. In June 2001, this Court decided *Zadvydas* v. *Davis*, 533 U.S. 678, which addressed the legality of the continued detention under 8 U.S.C. 1231(a)(6) of aliens who initially had been granted the status of lawful permanent residents and later were ordered removed, but who could not be removed within the 90-day statutory removal period. The Court construed Section 1231(a)(6) "to contain an implicit 'reasonable time'

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[2] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See *Landon* v. *Plasencia*, 459 U.S. 21, 25, 28 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were "deportable." See 8 U.S.C. 1251 (1994). Under IIRIRA, the new statutory category of "inadmissible" aliens includes both aliens who have not entered the country and formerly were termed "excludable," and aliens who entered the United States without permission and formerly were termed "deportable." See 8 U.S.C. 1182(a).

limitation." 533 U.S. at 682. In particular, to avoid "a serious constitutional problem," *id.* at 690, that would arise from indefinite detention of the former permanent resident aliens, the Court construed the Attorney General's authority to detain such aliens under Section 1231(a)(6) to be limited to the period of time reasonably necessary to remove them from the United States. *Id.* at 689. After that point, the Court reasoned, "detention no longer 'bears a reasonable relation to the purpose for which the individual was committed.'" *Id.* at 690 (quoting *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972) (brackets omitted)). "[F]or the sake of uniform administration," the Court further determined that detention for a period of six months is presumptively reasonable. *Zadvydas*, 533 U.S. at 701. After that presumptively reasonable period, if "the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Ibid.*

The Court emphasized in *Zadvydas* that "[a]liens who have not yet gained initial admission to this country would present a very different question," which was not before the Court. 533 U.S. at 682. Furthermore, in its analysis of the potential constitutional problem posed by detention of deportable permanent resident aliens, the Court rejected the United States' reliance on *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), even though that case "involve[d] indefinite detention." 533 U.S. at 693. In *Mezei*, the Court held that the detention of an alien who unsuccessfully sought entry into the United States but could not be removed did not violate due process. See 345 U.S. at 210-216. In *Zadvydas*, the Court stated that *Mezei* "differs from [*Zadvydas*] in a critical respect,"

because Mezei's detention on Ellis Island was a continuation of his exclusion rather than a successful entry into the United States. 533 U.S. at 693. The Court noted that aliens stopped at the border remain applicants seeking initial admission to the United States even if they are physically present in the country. *Ibid.* Mezei's status as an excludable alien at the border, the Court explained in *Zadvydas*, "made all the difference." *Ibid.*

3. In this case, the Ninth Circuit—in conflict with a majority of the circuits that have addressed the issue, but in agreement with the Sixth Circuit—determined that *Zadvydas*'s six-month rule requires the release from detention of an excludable Mariel Cuban with an extensive criminal history.

a. In May 1980, respondent arrived near Key West, Florida, and was prevented from entering the United States. That same month, the INS granted respondent temporary immigration parole pursuant to 8 U.S.C. 1182(d)(5)(A). See App., *infra*, 2a; C.A. E.R. 24-25.

Respondent was convicted of numerous crimes in Florida while he was on immigration parole. In 1983, respondent was charged with two counts of battery on a law enforcement officer. He received one year of probation with a deferred adjudication of guilt. C.A. E.R. 1-5. In March 1987, respondent was convicted of possessing burglary tools, attempted burglary of a structure, and possessing cocaine. He received one year of probation for those offenses. *Id.* at 6-9. In January 1988, respondent was convicted of burglary of an occupied dwelling and sentenced to one year in a community control program and drug rehabilitation. *Id.* at 10-11. In February 1989, respondent was convicted of felony burglary of a conveyance and petty theft and was sentenced to five years of probation on

the burglary count. *Id.* at 12-14. In July 1989, he was convicted of burglary of an unoccupied structure and resisting an officer and received a sentence of 364 days of imprisonment. *Id.* at 15-17. In May 1991, respondent was convicted of cocaine possession, using or possessing drug paraphernalia, and burglary of a dwelling. Respondent's 1989 probation was revoked and he received a sentence of five years of imprisonment. *Id.* at 18-23; App., *infra*, 2a. In September 1992, respondent was convicted of escape and sentenced to one year and one day of imprisonment. C.A. E.R. 26, 40; App., *infra*, 2a.[3]

In December 1992, the INS revoked respondent's immigration parole and commenced exclusion proceedings against him based on his criminal convictions and his lack of valid documents for entering the United States. C.A. E.R. 24-27; App., *infra*, 2a. In May 1993, an immigration judge determined that respondent is excludable from the United States and ordered him deported to Cuba. *Ibid.;* C.A. E.R. 28. Respondent waived an administrative appeal. *Ibid.*

In 1995, at the completion of his criminal sentence, the INS took respondent into custody. App., *infra*, 2a. The INS was not able to remove respondent to Cuba because the Government of Cuba would not accept his return. *Ibid.* As required by the parole regulations applicable to Mariel Cubans, see 8 C.F.R. 212.12(g), the INS reviewed respondent's custody status on an annual basis during his detention. In 1996, respondent was approved for a second immigration parole. App., *infra*,

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[3] The court of appeals' recitation of the facts surrounding respondent's escape conviction differ slightly from those that appear elsewhere in the record. That difference is immaterial to the instant petition.

2a-3a; C.A. E.R. 29. The INS released respondent to a halfway house in 1997. *Id.* at 30.

In June 2000, respondent was convicted in Washington State of delivering cocaine, for which he was sentenced to 27 months of imprisonment. C.A. E.R. 31-33; see App., *infra*, 3a. Upon respondent's release from prison in October 2001, the INS again took respondent into immigration custody under his 1993 order of exclusion. *Ibid.*

b. In January 2002, respondent filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the Western District of Washington. Respondent contended in his petition that his detention by the INS violated his due process rights under the Fifth Amendment and that his release was required under *Zadvydas* because Cuba had not accepted his repatriation. App., *infra*, 3a; C.A. E.R. 34-38.

In April 2002, the district court denied respondent's petition. App., *infra*, 16a-22a; see *id.* at 3a & n.4. The district court explained that "the six-month presumptively reasonable post-removal detention period outlined in *Zadvydas* applies only to aliens who have effected an entry into the United States," and cited *Zadvydas*'s discussion of *Mezei* as a "particularly clear" indication that the six-month period does not apply to aliens who are stopped at the border and denied admission. *Id.* at 18a. The court then addressed respondent's due process arguments under the Fifth Amendment. It determined that respondent, as an excludable alien who was stopped at the border, "may not assert procedural due process rights to attack the admissions process," and that "[respondent's] substantive due process rights are met by the annual opportunity for [custody] review afforded by [8 C.F.R. 212.12]. App., *infra*, 20, 21a.

On August 1, 2002, the Ninth Circuit held in *Lin Guo Xi* v. *INS*, 298 F.3d 832, "that *Zadvydas* applies to inadmissible individuals" who were stopped at the border, denied admission, and ordered removed from the United States under the post-1996 immigration laws, *id.* at 836, and, therefore, the detention of such aliens is subject to the reasonable-time limitation and six-month presumption established by this Court in *Zadvydas*, see *id.* at 839-840.

On August 16, 2002, the district court granted respondent's motion for reconsideration and granted his habeas corpus petition. App., *infra*, 11a-12a. The court determined that, because petitioner's removal to Cuba was "extremely unlikely" and he had been in immigration detention for more than six months, *Xi*'s extension of *Zadvydas* to an inadmissible alien "compel[led]" respondent's release. *Id.* at 12a.

The government moved for reconsideration, arguing that respondent's detention is governed by the pre-IIRIRA law that applied at the time respondent's final order of exclusion was entered, see, *e.g.*, 8 U.S.C. 1226(e) (1994), rather than by current Section 1231(a)(6). See App., *infra*, 14a. On November 15, 2002, the district court denied the government's motion for reconsideration. *Id.* at 13a-15a. The court stated that "[t]he INS cannot reasonably rely on repealed detention provisions" and noted that *Zadvydas* involved the detention of a lawful permanent resident alien who (like respondent) was ordered deported before the 1996 immigration amendments. *Id.* at 14a-15a (citing *Zadvydas*, 533 U.S. at 684).

In December 2002, respondent was released from a halfway house and into the community pursuant to the district court's order. Gov't C.A. Br. 7.

c. The court of appeals affirmed the district court's decision ordering respondent's release. App., *infra*, 1a-10a. The court noted that respondent did not contest the district court's rejection of his constitutional arguments, but only defended the district court's determination that his detention is not authorized by statute in light of *Zadvydas* and *Xi*. *Id.* at 4a n.6. The court therefore concluded that the lawfulness of respondent's detention depends on whether it is authorized by pre-IIRIRA law that survived the 1996 immigration amendments, "for we already have held in *Xi* that the new post-IIRIRA detention statute—8 U.S.C. § 1231(a)(6)—does not authorize the INS to detain inadmissible aliens indefinitely." App., *infra*, 5a-6a.

The court then addressed Section 309(c) of IIRIRA, 110 Stat. 3009-625, which established a general effective date of April 1, 1997, for new 8 U.S.C. 1231, but further established a transition rule stating: "[I]n the case of an alien who is in exclusion or deportation proceedings before [April 1, 1997,] * * * [new Section 1231] shall not apply, and * * * the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." IIRIRA § 309(c)(1), 110 Stat. 3009-625, reprinted as amended in 8 U.S.C. 1101 note. The court of appeals determined that the transition rule "shields pre-IIRIRA proceedings only from the application of new *procedural* laws," and therefore "does not preserve [8 U.S.C. 1226(e) (1994)] insofar as it authorizes detention, a substantive matter." App., *infra*, 7a, 8a. The court therefore concluded that "*Zadvydas* and *Xi* are squarely applicable" to respondent's detention insofar as they interpret 8 U.S.C. 1231(a)(6), and that those cases require respondent's release. App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

The question in this case is whether the reasonable-time limitation and six-month presumption that this Court articulated in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), or, alternatively, 8 U.S.C. 1231(a)(6) itself, compels the release of arriving aliens like respondent, who have been apprehended at the border, denied admission to the United States, and ordered removed. A petition for a writ of certiorari that presents the same issues under Section 1231(a)(6), likewise in the context of an alien who was ordered excluded before the enactment of the 1996 immigration amendments, is pending in *Benitez* v. *Wallis*, No. 03-7434 (filed Oct. 14, 2003), which arises from the Eleventh Circuit.

The courts of appeals are divided on the question whether *Zadvydas*'s limitation on the duration of post-removal-order detention under Section 1231(a)(6) applies to aliens who have been stopped at the border and denied admission. Like the Ninth Circuit, the Sixth Circuit applies *Zadvydas*'s six-month rule to limit the detention of such aliens when there is not a significant likelihood they will be removed in the reasonably foreseeable future. See App., *infra*, 1a-10a; *Arango Marquez* v. *INS*, 346 F.3d 892 (9th Cir. 2003) (excludable Mariel Cuban); *Rosales-Garcia* v. *Holland*, 322 F.3d 386 (6th Cir.) (en banc) (same), cert. denied, 123 S. Ct. 2607 (2003); *Lin Guo Xi* v. *INS*, 298 F.3d 832 (9th Cir. 2002) (inadmissible alien ordered removed under post-1996 law).

The Third, Fifth, Eighth, and Eleventh Circuits, by contrast, have determined that *Zadvydas* does not limit the detention of arriving aliens who have been denied admission into the United States. See *Sierra* v. *Romaine*, 347 F.3d 559 (3d Cir. 2003); *Benitez* v. *Wallis*,

337 F.3d 1289 (11th Cir. 2003), petition for cert. pending, No. 03-7434 (filed Oct. 14, 2003); *Borrero* v. *Aljets*, 325 F.3d 1003 (8th Cir. 2003); *Rios* v. *INS*, 324 F.3d 296 (5th Cir. 2003). Similarly, the Tenth Circuit has stated after *Zadvydas* that Section 1231(a)(6) preserves agency discretion whether to deny immigration parole to an excluded Mariel Cuban. *Sierra* v. *INS*, 258 F.3d 1213, 1219 (10th Cir.), cert. denied, 534 U.S. 1071 (2001). See also *Hoyte-Mesa* v. *Ashcroft*, 272 F.3d 989 (7th Cir 2001) (rejecting, after *Zadvydas*, due process challenge to Mariel Cuban's detention), cert. denied, 537 U.S. 846 (2002).

In its response to the alien's petition for a writ of certiorari in *Benitez*, the government suggests that the petition in that case should be granted in view of the circuit conflict and the importance of the question. The petition in this case should be held pending the Court's disposition of *Benitez* and disposed of in accordance with the Court's final disposition of that case.[4]

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[4] The government's brief in *Benitez* (at 10 n.3) expressly does not contest the Eleventh Circuit's determination that, in that case, the government waived any argument that the alien's detention is governed by pre-IIRIRA law, including 8 U.S.C. 1226(e) (1994). Likewise, this petition does not seek review of the Ninth Circuit's determination that the pre-IIRIRA detention provisions do not apply to respondent. As the government's *Benitez* brief states (at 21-22 n.3), no court of appeals has adopted the view that the pre-IIRIRA detention provisions, including 8 U.S.C. 1226(e) (1994), apply generally to aliens who were ordered removed under pre-IIRIRA law.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition in *Benitez* v. *Wallis*, petition for cert. pending, No. 03-7434 (filed Oct. 14, 2003), and then should be disposed of as appropriate in light of the final disposition of that case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

DECEMBER 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35026

GILBERTO MARTINEZ-VAZQUEZ, PETITIONER-APPELLEE

v.

IMMIGRATION AND NATURALIZATION SERVICE; JOHN ASHCROFT, ATTORNEY GENERAL; ROBERT S. COLEMAN, JR., RESPONDENTS-APPELLANTS

Oct. 1, 2003

Before: ALARCON, GOULD, and CLIFTON, Circuit Judges.

OPINION

GOULD, Circuit Judge:

We must decide whether former 8 U.S.C. § 1226(e)—a statutory provision Congress largely repealed[1] in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")—authorizes the Immigration and Naturalization Service to continue detaining an inadmissible alien. We conclude that former § 1226(e) does not authorize the alien's detention, so we

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[1] Under the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), IIRIRA repealed and replaced pre-IIRIRA law except for proceedings ongoing as of IIRIRA's effective date.

affirm the district court's grant of the alien's petition for writ of habeas corpus.

I

Petitioner-appellee Gilberto Martinez-Vazquez ("Martinez") is a Cuban citizen who arrived in the United States in 1980 as part of the "Mariel Boatlift." He was paroled into the United States pursuant to 8 U.S.C. § 1182(d)(5)(A), which authorizes the INS to parole inadmissible aliens at its discretion. *See id.* Between 1981 and 1992, Martinez was convicted of six felonies. In September 1992, Martinez escaped from custody while serving a six-year sentence for burglary and possession of cocaine. Because of Martinez's felony convictions, the INS revoked his parole and commenced removal proceedings. Martinez was apprehended three months later and was again arrested for possession of cocaine. Martinez was sentenced to five years for the cocaine possession conviction, and to a year and a day for having escaped from Dade County Jail. On May 11, 1993, Martinez was ordered removed to Cuba. Martinez entered INS custody in 1995, after serving approximately three years of his criminal sentence in state prison.

The INS was unable to effectuate Martinez's removal order because Cuba refused to accept his return.[2] Consequently, Martinez remained in INS custody until his case was reviewed by a Cuban Review Panel and he

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[2] The United States has been discussing the return of inadmissible aliens with Cuban authorities for almost two decades with little progress. According to the record, the United States is still detaining about 1,750 removable Mariel Cubans because Cuba will not accept them.

was released on parole in 1996.[3] In 2000, Martinez was convicted of another drug offense. He served a 27-month sentence in state prison and again entered INS custody in October 2001 to await removal to Cuba pursuant to the 1993 removal order.

Martinez filed a habeas corpus petition under 28 U.S.C. § 2241 in the district court on January 18, 2002, arguing that his continued detention was improper under the Supreme Court's ruling in *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), which interpreted 8 U.S.C. § 1231(a)(6) not to authorize indefinite detention of removable aliens. *Zadvydas*, 533 U.S. at 699, 121 S. Ct. 2491. The district court denied Martinez's habeas petition, concluding that the limitation on indefinite detention in § 1231(a)(6), explained by the *Zadvydas* Court, did not apply to inadmissible aliens.[4]

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[3] The Cuban Review Plan, 8 C.F.R. §§ 212.12-13, established a parole review program for removable "Mariel Cubans." Detainees are reviewed annually by a panel that assesses their suitability for parole. Paroled aliens remain subject to their final removal orders.

[4] The district court held, and the INS does not dispute on appeal, that Martinez's detention constituted "indefinite detention" as defined by the Supreme Court in *Zadvydas*, because Martinez had spent more than six months in INS custody (Martinez spent ten months in custody before the district court ordered his release) and there was no significant likelihood of his removal in the reasonably foreseeable future. 533 U.S. at 701, 121 S. Ct. 2491.

The INS on appeal does not challenge the district court's conclusion, consistent with *Zadvydas* and *Xi*, that § 1231(a)(6)—the IIRIRA provision authorizing post-removal-order detentions—does not authorize Martinez's detention. Instead of addressing interpretation of § 1231(a)(6), the INS rests its argument for continued detention of Martinez on the theory he can be held under former § 1226(e).

In August 2002, we decided *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), holding to the contrary that *Zadvydas's* reasoning and statutory interpretation applied also to inadmissible aliens. *Id.* at 840. Martinez moved for reconsideration, asserting that the district court's refusal to apply *Zadvydas* to his detention was inconsistent with our *Xi* holding. The district court found that *Xi* was controlling and reversed its prior decision, granting Martinez's habeas petition.

The INS filed a motion for reconsideration, maintaining that *Zadvydas* and *Xi* were not controlling here because Martinez's detention after the final removal order began before IIRIRA's effective date. The INS argued that Martinez's continued detention is authorized by pre-IIRIRA statute, not by § 1231(a)(6), the statute interpreted in *Zadvydas* and *Xi* to prohibit indefinite detention.[5] The district court denied the INS's motion for reconsideration, finding that the INS's "assertion that a repealed section of the Immigration and Nationalization Act ('INA') governs [Martinez's] current detention to be untenable." The INS appealed the district court's order denying its motion for reconsideration.[6]

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[5] The district court had discretion not to consider the INS's new argument, advanced for the first time in its motion for reconsideration, that pre IIRIRA law authorizes Martinez's detention, *see Novato Fire Protection Dist. v. United States*, 181 F.3d 1135, 1141 n.6 (9th Cir. 1999). But the district court exercised its discretion to consider the argument and held, as the basis for denying the motion for reconsideration, that the argument was incorrect.

[6] Martinez advanced a constitutional argument in the district court, and the district court rejected it. Martinez has not advanced that constitutional argument on appeal, arguing only that his detention is not authorized by statute. We therefore need not and do not address the constitutionality of Martinez's continued detention.

II

We review de novo the district court's decision to grant Martinez's petition for writ of habeas corpus. *See Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002); *Zitto v. Crabtree*, 185 F.3d 930, 931 (9th Cir. 1999).

The propriety of the INS's continued detention of Martinez depends on whether former 8 U.S.C. § 1226(e) (1994)[7] authorizes Martinez's detention, for we already have held in *Xi* that the new post-IIRIRA detention

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[7] Former § 1226(e) stated

> (1) Pending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien . . .
>
> (2) Notwithstanding any other provision of this section, the Attorney General shall not release such felon from custody unless the Attorney General determines that the alien may not be deported . . .
>
> (3) If the determination described in paragraph (2) has been made, the Attorney General may release such alien only after—
>
> (A) a procedure for review of each request for relief under this subsection has been established,
>
> (B) such procedure includes consideration of the severity of the felony committed by the alien, and
>
> (C) the review concludes that the alien will not pose a danger to the safety of other persons or to property.

Because we conclude that IIRIRA repealed former § 1226(e)'s grant of authority to the INS to detain aliens, we need not and do not reconsider our *Barrera-Echavarria v. Rison* holding to determine whether the Supreme Court's *Zadvydas* reasoning would compel us to interpret former § 1226(e) not to authorize indefinite detentions. *See Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1445 (9th Cir. 1995) (holding, before the Supreme Court's *Zadvydas* decision, that former § 1226(e) authorized indefinite detentions).

statute—8 U.S.C. § 1231(a)(6) (2003)[8]—does not authorize the INS to detain inadmissible aliens indefinitely.

The INS ordered Martinez removed before Congress's enactment of IIRIRA at a time when former § 1226(e) granted the Attorney General authority to detain inadmissible aliens. *See Alvarez-Mendez v. Stock*, 941 F.2d 956, 961(9th Cir. 1991), *cert. denied*, 506 U.S. 842, 113 S. Ct. 127, 121 L. Ed. 2d 82 (1992). IIRIRA replaced former § 1226(e) with new § 1231(a)(6) and created a "transition rule" that governs application of IIRIRA to aliens in proceedings begun before IIRIRA's effective date. The transition rule, IIRIRA § 309(c)(1), provides

> [I]n the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date [April 1, 1997]—(A) the amendments made by this subtitle shall not apply, and (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

Thus, § 309(c)(1) instructs courts to apply some pre-IIRIRA law to proceedings begun before April 1, 1997.

Section 309(c)(1) does not preserve former § 1226(e) as a source of authority to detain aliens. Section 309(c)(1) preserves the pre-IIRIRA statutory landscape for an alien "who *is in . . . proceedings* " begun before the effective date, providing that these "*proceed-*

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[8] Section 1231(a)(6) states, "An alien ordered removed who is inadmissible . . . removable . . . or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to . . . supervision."

ings . . . shall continue to be conducted" under pre-IIRIRA law (emphasis added). The implication is that the rule was intended to preserve pre-IIRIRA procedures for ongoing "proceedings" initiated under pre-IIRIRA law. Martinez's continued detention is not an ongoing "proceeding." *See Richardson v. Reno*, 180 F.3d 1311, 1317 (11th Cir. 1999) ("detention always has been considered a separate and distinct matter from a removal proceeding"); *see also* BLACK'S LAW DICTIONARY 1221 (7th ed. 1999) (defining proceeding as "[the] regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment"). Consequently, § 309(c)(1) does not preserve former § 1226(e) as authority to detain Martinez.

The Supreme Court interpreted § 309(c)(1) in precisely this manner in *St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347, concluding that § 309(c)(1) shields pre-IIRIRA proceedings only from the application of new *procedural* laws. The Court stated:

> Section 309(c)(1) is best read as merely setting out the *procedural* rules to be applied to removal proceedings pending on the effective date of the statute.[9] *Id.* at 318, 121 S. Ct. 2271.

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[9] The Supreme Court drew support for its assertion from a Conference Report explaining that "[Section 309(c)] provides for the transition to *new procedures* in the case of an alien already in exclusion or deportation proceedings on the effective date." H.R. Conf. Rep. No. 104-828, p. 222 (1996) (emphasis added).

Thus, the transition rule does not preserve former § 1226(e) insofar as it authorizes detention, a substantive matter.[10]

Our conclusion that § 309(c)(1) does not preserve former § 1226(e)'s grant of authority to detain aliens is consistent with the Supreme Court's treatment of former § 1226(e) in *Zadvydas*. The habeas petitioner in *Zadvydas* was issued a final removal order in 1994, before IIRIRA's enactment. Even though the petitioner's final removal order was entered before IIRIRA, the Court interpreted new § 1231(a)(6). *See Zadvydas*, 533 U.S. at 682, 121 S.Ct. 2491. This treatment of § 1231(a)(6) by the Supreme Court reinforces our conclusion that it is § 1231(a)(6) that now must be considered to authorize or constrain any detention after a removal order. *See id.* (interpreting § 1231(a)(6) not to authorize indefinite detention and reversing a denial of a habeas petition on that ground).[11]

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[10] Addressing an issue similar to that presented in this case, but arising in a different procedural context and with some different arguments of parties, another panel of our circuit recently provided a detailed analysis of § 309(c)(1) and its application. *Marquez v. INS*, 2003 WL 22156287 (9th Cir. Sep.19, 2003). We agree fully with this analysis and our reasoning and holding today are consistent with that of the *Marquez* panel.

[11] The INS attempts to distinguish *Zadvydas* by noting that the government treats pre-IIRIRA deportable aliens differently from inadmissible aliens for detention purposes because Congress enacted the Transition Period Custody Rules (codified at IIRIRA § 303(b))—a separate transitional provision regulating the custody of most criminal deportable aliens. The INS cites four of our sister circuits' decisions as its argued support for its proposition that *Zadvydas* does not affect the INS's ability to indefinitely detain inadmissible Mariel Cubans. *See Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003); *Jimenez Rios v. INS*, 324 F.3d 296 (5th Cir. 2003);

We reach the same conclusion that the Sixth Circuit reached in *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) (en banc), *cert. denied*, —— U.S. ——, 123 S. Ct. 2607, 156 L. Ed. 2d 627 (2003), holding that § 309(c) does not preserve former § 1226(e) as authority to detain inadmissible aliens with pre-IIRIRA removal orders. *Id.* at 403. The *Rosales-Garcia* court correctly explained that petitioners were not challenging the legality of their original detention, but rather the INS's authority to detain them indefinitely now. *See id.* at 402.

This same valid point was made by the district court's incisive order in this case, stressing that the court would "not determine the legality of a person's *current* detention under a *repealed* statute." This makes sense to us. Stated another way, the core use of the Great Writ, here by virtue of 28 U.S.C. § 2241, is to grant freedom to a person beseeching the court to exercise its power to end a current detention. And here, § 1231(a)(6)—the statute that now authorizes the INS

Hoyte-Mesa v. Ashcroft, 272 F.3d 989 (7th Cir. 2001); *Sierra v. INS*, 258 F.3d 1213 (10th Cir. 2001). None of these decisions by our sister courts persuades us to reverse the district court here. The Tenth Circuit in *Sierra* did not reach the question whether former § 1226(e) continues to authorize post-removal-order detentions. *See* 258 F.3d at 1216. And, the Fifth, Seventh, and Eighth Circuits' decisions in *Borrero*, *Jimenez Rios*, and *Hoyte-Mesa* directly contradict our *Xi* holding by concluding that the Supreme Court's *Zadvydas* reasoning applies only to *deportable* aliens, and not to *inadmissible* aliens like Martinez. *See Borrero*, 325 F.3d at 1007; *Jimenez Rios*, 324 F.3d at 297; *Hoyte-Mesa*, 272 F.3d at 991. In *Xi*, we refused to draw such a distinction and held that the Supreme Court's interpretation of § 1231(a)(6) in *Zadvydas* extended to inadmissible aliens. *See Xi*, 298 F.3d at 839. Thus, the precedent urged by the INS is wholly unpersuasive to us, and we are bound to follow *Zadvydas* and *Xi*.

to detain aliens for a reasonable time—is the applicable statute, not former § 1226(e).[12] *Id.* Thus, *Zadvydas* and *Xi* are squarely applicable. The district court did not err in granting Martinez's petition for a writ of habeas corpus, nor in denying the INS's motion for reconsideration.[13]

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[12] We similarly distinguished present detention challenges in *Alvarez-Mendez*, 941 F.2d at 960, noting that a petition for habeas corpus, unlike a claim for illegal detention, involves the legality of an alien's *present* detention and should be analyzed under the current statute. *Id.*

[13] The INS cites 8 C.F.R. § 241.4(a)(1) and argues that the regulation is a reasonable agency interpretation, owed *Chevron* deference, that former § 1226(e) continues to authorize the detention of inadmissible aliens convicted of aggravated felonies. The regulation provides that the review procedures governing custody after a final removal order apply to inadmissible aliens, "including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990 . . . codified at 8 U.S.C. § 1226(e)(1) through (e)(3)." 8 C.F.R. § 241.4(a)(1). In our view, the INS is mistaken because the regulation involves application of former § 1226(e)'s custody review "procedures," not its substantive authorization of detentions.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

No. C02-67P
A22 772 793

GILBERTO MARTINEZ-VASQUEZ, PETITIONER

v.

JOHN D. ASHCROFT, ET AL., RESPONDENTS

ORDER GRANTNG PETITIONER'S MOTION FOR RECONSIDERATION AND GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is a Cuban citizen with a final order of removal detained by the Immigration and Naturalization Service ("INS") since October 9, 2001 pursuant to 8 U.S.C. § 1231(a)(6). This Court denied Petitioner's habeas corpus petition on the grounds that the six month presumptively reasonable post-removal detention period outline in *Zadvydas v. Davis*, 533 U.S. 678 (2001), did not apply to inadmissible aliens. Soon after this ruling, the Ninth Circuit published an opinion that arrived at the opposite conclusion. *Xi v. INS*, __ F.3d __, 2002 WL 1766307 *3 (9th Cir. 2002) ("[t]he clear text of the statute [§ 1231(a)(6)], coupled with the Supreme Court's categorical interpretation, leaves us little choice but to conclude that *Zadvydas* applies to inadmissible individuals."). Although the mandate has

not issued, the *Xi* decision is the law this Court follows. *Chambers v. United States*, 22 F.3d 939, 942 (9th Cir. 1994), *vacated on other grounds*, 47 F.3d 1015 (1995) ("once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court."). Because the parties never disputed that Petitioner was extremely unlikely to be removed to Cuba, the court's ruling in *Xi* compels the conclusion that Petitioner's habeas petition should be granted. *Id.* Petitioner timely removed (*sic*) for reconsideration of this Court's prior Order, and the Court provided the Respondents with an opportunity to reply. They have not opposed Petitioner's motion.

The Court, accordingly, Orders as follows:

1. The Court finds that Petitioner's detention after the expiration of the six-month period is statutorily unauthorized under *Zadvydas*.

2. The Petition for Writ of Habeas Corpus is GRANTED;

3 Petitioner shall be released from INS custody no later than two business days after entry of this Order, on conditions set by the INS which may include those set forth in 8 C.F.R. § 241.5(a).

The Clerk is directed to send copies of this order to all counsel of record and to Judge Benton.

Dated: August 16, 2002.

/s/ MARSHA J. PECHMAN
MARSHA J. PECHMAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. C02-67P
A22-772-793

GILBERTO MARTINEZ-VASQUEZ, PETITIONER

v.

JOHN D. ASHCROFT, ET AL., RESPONDENTS

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

Respondents move for reconsideration of this Court's order granting Petitioner's habeas corpus petition. (Dkt. No. 20.) Petitioner is a Cuban citizen ordered excluded in 1993 who was paroled in 1996. On parole, Petitioner was convicted of a felony offense and, upon completion of that sentence, had his parole revoked. After being detained for well-over six months, petitioner moved for release under *Zadvydas v. Davis*, 533 U.S. 678 (2001). This Court initially denied his petition. After the Ninth Circuit decided *Xi v. INS*, 289 F.3d 832 (9th Cir. 2002), which applied the statutory provisions of 8 U.S.C. § 1231(a)(6) at issue in *Zadvydas* to inadmissible aliens, Petitioner timely moved for reconsideration. The Court asked for a response from the government, and none was filed. Concluding that *Xi* mandated Petitioner's release, the Court granted the habeas corpus petition. Respondents move for recon-

sideration on the grounds that former 8 U.S.C. § 1226(e) (repealed 1996), not 8 U.S.C. § 1231(a)(6), determines the legality of Petitioner's current detention. Because the Court concludes that no legal error was committed, Respondents' Motion for Reconsideration is DENIED.

Motion for reconsideration are disfavored. Local Rule CR 7(h)(1). The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence. *Id.*

Respondents did not respond to Petitioner's motion for reconsideration, despite the Court's invitation. Respondents offer no explanation of why the arguments in their motion for reconsideration could not have been brought to the Court's attention earlier. The Court finds Respondents' assertion that a repealed section of the Immigration and Nationalization Act ("INA") governs Petitioner's current detention to be untenable. The Court will not determine the legality of a person's *current* detention under a *repealed* statute. In other immigration contexts, as Respondent points out, past law may govern. For example, Congress has directed that persons ordered excluded or deported under prior law so remain, although now removal has replaced exclusion and deportation. A person's prior status adjudication is distinct from the government's current authority to detain. In 1996 Congress passed a new section of the INA addressing detention and repealed prior provisions. The INS cannot reasonably rely on repealed detention provisions to authorize indefinite detention impermissible under current statute, as construed by the Courts. Furthermore, the *Zadvydas*

decision applied § 1231(a)(6) to persons ordered deported under prior law, not just those ordered deported after new law became effective. 533 U.S. at 684 (Petitioner Zadvydas ordered deported in 1994.) Respondents' Motion for Reconsideration is DENIED.

The Clerk is directed to send copies of this order to all counsel of record.

Dated: November 14, 2002.

/s/ MARSHA J. PECHMAN
MARSHA J. PECHMAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

No. C02-67P

GILBERTO MARTINEZ-VASQUEZ, PETITIONER

v.

JOHN D. ASHCROFT, ET AL., RESPONDENTS

[July 23, 2002]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is a Cuban citizen who has been detained by the Immigration and Naturalization Service ("INS"), pending a review of his custody under the Cuban Review Plan, pursuant to 8 C.F.R. § 212.12. On January 18, 2002, he filed a petition for writ of habeas corpus under 28 U.S.C. § 2241 challenging his detention. (Dkt. No. 3). The matter was referred to the Honorable Ricardo S. Martinez, United States Magistrate Judge, who issued a Report and Recommendation denying the petition. (Dkt. No. 12). The Court has review the habeas petition, Respondents' Return and Status Report, Petitioner's Response, the Report and Recommendation, and Petitioner's Objections. On review, the

Court concludes that Petitioner's detention is lawful. Therefore, the Court finds and Orders:

(1) The Report and Recommendation, (Dkt. No. 12), is ADOPTED.

(2) Petitioner's § 2241 petition, (Dkt. No. 3), is DENIED and this action is DISMISSED.

The Court writes this Order to address to (*sic*) the issues raised in Petitioner's Objections to the Report and Recommendation.

BACKGROUND

As detailed in Judge Martinez's Report and Recommendation, Petitioner arrived in the United States as part of the Mariel boatlift in 1980 and was paroled into the United States in the exercise of the Attorney General's discretionary authority. His parole was revoked in 1992 after he was convicted of possession of cocaine and escape from custody. In 1993, Petitioner was ordered excluded and deported to Cuba, based on his criminal convictions. It is undisputed that the INS is currently unable to remove Petitioner to Cuba, and there is no expectation that Petitioner will be removed to Cuba in the reasonably foreseeable future. After serving his sentence and being detained by the INS for approximately one year, Petitioner was again granted parole in 1996 by the Cuban Review panel. While on parole, in 2000 Petitioner was convicted of a drug offense and sentenced to 27 months incarceration. After serving this sentence, he entered INS custody on or about October 9, 2001.

ANALYSIS

Judge Martinez's Report and Recommendation concludes that the Petitioner does not fall into the class of

detained aliens considered by *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001), so that his detention for more than six months is lawful. Additionally, the Report and Recommendation concludes that the Cuban Review Plan, both on its face and in its application, does not violate Petitioner's right to due process. In his Objections, Petitioner argues that *Zadvydas* applies to aliens like Petitioner who have not effected an entry and that the provisions of the Cuban Review Plan violate his procedural due process rights.

I. Zadvydas

The Court agrees with Judge Martinez that the six-month presumptively reasonable post-removal detention period outlined in *Zadvydas* applies only to aliens who have effected an entry into United States. (Report and Recommendation at 2-5.) This is made particularly clear in the *Zadvydas* Court's analysis of *Shaughnessy v. United States ex re. Mezei*, 345 U.S. 206 (1953), which refused to apply constitutional limits to the detention of aliens denied admission at the border. Rather than reexamine *Mezei*, as it was urged to do by the petitioners, the Court distinguished the case, noting that the *Zadvydas* petitioners had effected an entry into the United States when removal proceedings were initiated. 121 S. Ct. at 2500-01. It is clear that under this "entry fiction" doctrine, even long-resident parolees such as Petitioner are not considered to have entered the United States, and are instead treated as if they are seeking entry at the border, *Ma v. Ashcroft*, 257 F.3d 1095, 1108 n.20 (9thCir. 2001); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 961 (9th Cir. 1991), *cert. denied*, 506 U.S. 842 (1992). As Judge Martinez concluded, *Zadvydas* on its terms applies to aliens who fall into a different category than Petitioner.

In his Objections, Petitioner raises an issue of statutory interpretation not addressed in the Report and Recommendation. In *Zadvydas*, the Court interpreted the statute authorizing detention after entry of a removal order, 8 U.S.C. § 1231(a)(6), to avoid a "serious constitutional threat" raised by indefinite detention of an alien who had effected an entry. 121 S. Ct. at 2503. The Court concluded that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* Because § 1231(a)(6) on its face applies to all persons ordered removed, and does not distinguish between categories of removable aliens, Petitioner contends that as a matter of statutory interpretation *Zadvydas* applies to his case as well. As noted in the Report and Recommendation, court have divided on the issue, and the matter is currently before the Ninth Circuit Court of Appeals. In light of the discussion of *Zadvydas* and *Mezei* above, this Court concludes that *Zadvydas* construed the statute to avoid a constitutional issue only as it applied to aliens who had entered the United States. The conclusion that this Court draws from *Zadvydas* is that the Supreme Court intended, and had the authority, to construe the statute to limit the detention of an alien who has entered the United States to a period reasonably necessary to secure removal. This result does compel the same conclusion for aliens who have not entered the country. See *Chavez-Rivas v. Olsen*, __F. Supp. 2d __, 2002 WL 1448475 *3-9 (D.N.J. 2002).

II. Due Process

In the alternative, Petitioner argues that his procedural due process rights are violated by the Cuban Review Plan, as outlined in 8 C.F.R. § 212.12, both on its face and in its application. The Report and Recom-

mendation correctly concludes that Petitioner may not attack the Cuban Review Plan on the grounds of procedural due process. Courts have struggled with how to coherently square the serious due process concerns raised by the potentially indefinite detention of parolees with Congress' plenary power to control the admission of aliens to the United States. *See, e.g., Ngo v. INS*, 192 F.3d 390, 396-97 (3d Cir. 1999) (cataloging appellate cases on Cuban parolees). Because a parolee is not considered to have entered the United States, Petitioner's request for parole is evaluated as if he were seeking admission. *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1449-50 (9th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 976 (1995); *Alvarez-Mendez*, 941 F. 2d at 961. An Alien seeking admission may not assert procedural due process rights to attack the admissions process. *Id.* at 1448-49; *but see Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) (returning but "continuously present" resident has procedural due process rights). Nonetheless, it is clear that Petitioner, even as an alien seeking parole, has Fifth Amendment due process rights. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Courts have resolved the tension between due process and Congress' plenary power by concluding that the rights of an alien seeking admission are analyzed under the rubric of substantive due process. *Barrera-Echavarria*, 44 F.3d at 1449; *Ngo*, 192 F.3d at 396-97.

The Ninth Circuit in *Barrera-Echavarria* avoided the significant substantive due process concerns implicated in indefinite or permanent detention by characterizing the Cuban parolee petitioner's detention to be a "series of one-year periods of detention" followed by "an opportunity to plead his case anew." 44 F.3d at

1450. Consequently, this Court concludes that Petitioner's substantive due process rights are met by the annual opportunity for review afforded by the Cuban Review Plan. *Ngo*, 192 F.3d at 398; *see also Chavez-Rivas v. Olsen* at *11 ("[A] substantive right to process . . . is logical in the sense that the extent of the deprivation of the alien's liberty is limited by the requirement of highly focused and regular hearings."). Because the provisions of the Cuban Review Plan, in both their previous and current form, have been upheld by this Circuit and others, Petitioner's facial challenge must fail. *Barrera-Echavarria* at 1450; *Ngo* at 396, 399. The question of whether the Cuban Review Plan as applied to Petitioner fulfills the requirements of due process is not ripe for review. Petitioner has not yet been considered for review since being taken into INS custody nor detained for more than a year. Nor has Petitioner argued that his detention is in effect permanent because there is no reasonable expectation that the Cuban Review Panel will ever release him.

It is nonetheless important to address Petitioner's complaint regarding the application of the Cuban Review Plan, and in particular his lack of notice of when the INS will review his detention. In distinguishing indefinite or permanent detention from the situation of the Cuban parolees, *Barrera-Echevarria* noted that petitioner was provided with at least annual review, with the assistance of a representative and an opportunity to present oral and written information in support of release. 44 F.3d at 1450. The regulatory framework for these provisions, which also require that this representative "is able to attend at the time of the scheduled interview," are found in 8 C.F.R. § 212.12(d)(4)(ii). The opportunity to have a representative and present

information requires notice sufficient to effectively secure both. Otherwise, if the Cuban Review Plan as implemented fails to provide "an opportunity to plead the case anew," then Petitioner's detention cannot be considered as a series of one-year periods, and raises significant constitutional issues of substantive due process.

CONCLUSION

Petitioner's detention is lawful. Neither the Supreme Court's recent decision in *Zadvydas* nor due process require his release. The Report and Recommendation, (Dkt. No. 12), is ADOPTED. Petitioner's § 2241 petition, (Dkt. No. 3), is DENIED and this action is DISMISSED.

The Clerk is directed to send copies of this order to all counsel for record and to Judge Benton.

Date: July 23, 2002

/s/ MARSHA J. PECHMAN
MARSHA J. PECHMAN
United States District Judge